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STATEMENT OF FACTS

Appellants' statement of facts improperly includes argument and evidence contradictory to the jury's verdict and omits evidence in favor of the jury's verdict. Mo.R.Civ.P. 84.04(a); *First State Bank of St. Charles v. Frankel*, 86 S.W.3d 161, 169 (Mo.App. 2002). Following are the facts that support the jury's verdict.

Summary

Respondent Scanwell Freight Express STL Inc. (Scanwell) is one of several subsidiaries of Scanwell International Inc., an international freight-forwarding business. Tr. at 923-31, 942-44. Appellant Dimerco Express (USA) Corp. (Dimerco) is one of Scanwell's competitors. Tr. at 174-76, 267-68. Scanwell operated its business from an office near the St. Louis airport. Tr. at 430-33. Before April 2001 Dimerco had no St. Louis office. Tr. at 174-76, 267-68 Scanwell employed Chan as the general manager and highest ranked employee of its St. Louis office. Tr. at 428-29, 440, 444. Chan resigned as Scanwell's general manager effective March 1, 2001. Tr. at 491-93. By April 1, 2001, Scanwell's St. Louis office had become Dimerco's St. Louis office. Tr. at 428-33, 439-40. Dimerco had the same employees, office space, telephone number, furniture, equipment, vendors, and customers that previously had been Scanwell's. Tr. at 431-33, 568-73. Dimerco also had the same general manager of that office, Stevie Chan. Tr. at 431. The only difference between Scanwell's former office and Dimerco's new office was Dimerco's sign on the wall. Tr. at 433-34.

Procedural History

On July 6, 2001, Scanwell filed a petition against Chan and Dimerco for breach of fiduciary duty (Count I against Chan), conspiracy to breach fiduciary duty (Count II against Chan and Dimerco), unfair competition (Count III against Chan and Dimerco), and unjust enrichment (Count IV against Dimerco). L.F. at 9-16. A nine-day trial on the petition commenced on February 24, 2003, which included the testimony of twelve witnesses and the admission of hundreds of pages of documents. L.F. at 4. On March 10, 2003, the jury returned its verdict in favor of Scanwell on Counts I and II. L.F. at 4, 109-10. On their verdict forms, the jury assessed $54,000 in damages against Chan and $254,000 in damages against Dimerco. *Id*. at 109-10. On March 10, 2003, the trial court entered judgment on the jury's verdict for a total of $308,000. L.F. at 112-13. On May 23, 2003, the court denied all post-trial motions. L.F. at 196.

Appellants filed notices of appeal on June 2, 2003. L.F. at 197-203. The Eastern District Court of Appeals reversed the judgment for instructional errors. *Scanwell Freight Express STL Inc. v. Chan*, No. ED83035 (March 30, 2004). The court held Chan's employment by Scanwell did not create a fiduciary relationship as a matter of law and could not have created a fiduciary relationship unless Chan gained superiority and influence over Scanwell. *Id.* slip op. at 3-4. The court declared the verdict directing instructions (Nos. 7 and 12) erroneous for failing to require the jury to find Chan had gained superiority and influence over Scanwell. *Id.* The court also held the instructions erroneously failed to define "duty of loyalty" and used the term "including". *Id.* at 5-6. Scanwell applied to the district court for transfer to this Court on April 14, 2004, which

the court denied on May 13, 2004. Scanwell filed its application for transfer with this Court on May 27, 2004, which this Court granted on June 22, 2004.

Chronology Of Events

In April 1996, Scanwell hired Chan to be the general manager of Scanwell's new St. Louis business operation. Tr. at 440. Chan was granted full authority to establish the business, including the authority to negotiate and execute leases and other agreements, hire and fire personnel and negotiate terms with vendors. Tr. at 440-41, 444-50, 1100-03, 1120. She was provided access to the entire Scanwell network of confidential information. Tr. at 476-86, 944-48, 1104-05. Chan had full profit and loss responsibility and used her own unique accounting software for the financial record keeping of Scanwell's St. Louis operations. Tr. at 450-51, 460, 1102. Chan reported directly to M.B. Hassan, an officer of Scanwell's affiliate in Chicago and to Dennis Choy, the President of the entire Scanwell group of companies in San Francisco. Tr. at 441-42, 1102. Hassan entrusted the St. Louis operations to Chan, approving everything she requested and giving her a "free hand", subject only to keeping Hassan informed. Tr. at 1100, 1101:24-25, 1003:9-19. Scanwell paid for all expenses incurred in establishing this St. Louis business, including Chan's salary. Tr. at 451-55. Chan was the highest level Scanwell employee in St. Louis. Tr. at 444.

For five years Chan managed Scanwell's growing business in St. Louis. Tr. at 453-59, 470-476. Chan hired all the employees for Scanwell's St. Louis office, including her sister Sandy, boyfriend Al Chin, and a nephew. Tr. at 447-48. By use of Scanwell's international network of freight forwarding services, Chan managed substantial growth of

Scanwell's customer base and revenues. Tr. at 470-76, 954-61, 1106-09; Exh. 22. In 2000, Scanwell had a cash profit of $110,000, its best year, and in January 2001 had a cash profit of over $25,000, its best month ever. Tr. at 470-76, 986, 1108-09; Exh. 22.

Throughout this time Dimerco was Scanwell's direct competitor in the freight forwarding business, with offices throughout the United States but no office in St. Louis. Tr. at 174-76, 267-68; Exhs. 1, 1A (App. at A6-A18). Dimerco was seeking to expand its presence in the Midwest with minimal investment. *Id*. In July 2000, Chan began secretly negotiating with Dimerco to take over Scanwell's St. Louis office.[1] Tr. at 573-93; Exhs. 1, 1A. Kurt Brydenthal, a Dimerco representative, met with Chan in St. Louis to explore the opportunity of Dimerco establishing a business in St. Louis. Tr. at 180-81; Exhs. 1, 1A. In August 2000, Chan provided a tour of Scanwell's St. Louis office to Anthony Tien, a Dimerco officer in Chicago, and Brydenthal, along with Al Chin (then Operations Import Manager for Scanwell), and discussed further the potential for working together. Tr. at 182-88; Exhs. 1, 1A. Tien asked Chan to submit a business proposal to present to his superiors. Tr. at 188-89; Exhs. 1, 1A.

In September 2000, Chan and her sister Sandy (then Scanwell's Accounting Manager) met with Tien in Chicago. Tr. at 189-91; Exhs. 1, 1A. Chan submitted her

[1] Dimerco's confidential internal memorandum (Exhs. 1 and 1A, included in the Appendix at A6-A18) details the plan of Chan and Dimerco to take over Scanwell's St. Louis office, including a chronology of the development of the office, objectives, staffing, business forecasts and action plan. Tr. at 170, 178.

business proposal for establishing Dimerco's office in St. Louis. Tien forwarded this proposal to Roy Chen, Dimerco's top officer in North America. Tr. at 190; Exhs. 1, 1A. In October 2000, Chen instructed Tien to work out a deal with Chan and Dimerco reassured Chan of its intent to proceed. Tr. at 192; Exhs. 1, 1A, 3. Chan advised Dimerco she was planning to act in December 2000 and provided Dimerco information on Scanwell's customer base. Tr. at 193-201; Exh. 3. In November 2000, Dimerco officers and representatives discussed the options of taking over Scanwell's entire staff in St. Louis and Dimerco formally listed this project in its business plan for 2001. Tr. at 201-08; Exhs. 1, 1A, 4. In January 2001, Chan met key management in Dimerco's Chicago office. Tr. at 208-11; Exhs. 1, 1A. Dimerco introduced Chan to the Dimerco organization and explained profit sharing rules and performance standards. *Id*. Also, in January 2001, Chan started working on the conversion of Scanwell's St. Louis office into a Dimerco office. Tr. at 216-19; Exhs. 1, 1A. Chan provided Dimerco a tentative resignation date of February 20, 2001 and advised that she would be running Dimerco's new office by March 15, 2001. *Id*. Chan requested Dimerco's rate information to ease the transition of customers from Scanwell to Dimerco. *Id*. Chan sent Dimerco a confidential detailed customer profile (referred to as an "SOP") of Scanwell's largest customer in St. Louis. Tr. at 220-26; Exhs. 1, 1A, 5.[2] Chan advised one of her largest customers to visit

[2] Scanwell maintained confidential SOP's for all of its customers. The SOP contains account information, service summary, rate structure, billing instructions, handling and special requirements and shippers/vendors information. Tr. at 220-25; Exh. 5.

Dimerco's Shanghai office on February 14, 2001. Tr. at 238-39; Exhs. 1, 1A. In February 2001, Chan traveled to the business locations of Scanwell customers to advise of her impending resignation and new business arrangement with Dimerco. Tr. at 609-22, 622-29; Exh. 65. Chan charged her expenses for those travels to Scanwell. Tr. at 609-22. On February 15, 2001, Chan sent Dimerco an establishment plan and lease agreement. Tr. at 240; Exhs. 1, 1A, 6, 7. The lease was for Scanwell's office space and the lease agreement was identical to Scanwell's, except for the term. Tr. at 242-48; Exhs. 7, 20. Without advising Scanwell, Chan arranged with the landlord to move up the end of Scanwell's lease term from May 31, 2001 to March 31, 2001. This accelerated the expiration of Scanwell's option to renew the lease and allowed Dimerco to take over Scanwell's lease sooner. Tr. at 534-41, 1120-21; Exh. 20. The Dimerco lease was dated three days after the expiration date of Scanwell's option to renew. Tr. at 642-643; Exh. 7. Chan did not notify Scanwell of the expiration of the lease renewal option. Tr. at 537-38. Chan's establishment plan was for the complete take over of Scanwell's St. Louis business operation. Tr. at 249-57, 630-42; Exhs. 1, 1A, 6.

On February 20, 2001, Chan tendered her resignation to Scanwell effective March 1, 2001 and began closing down Scanwell's business. Tr. at 491-93, 527-30, 542-51, 1117-18; Exhs. 21, 23. Chan did not tell Scanwell of her intentions to work for Dimerco. Tr. at 521-22. She indicated her sister Sandy Chan would stay to finish the books because no one else knew the accounting software and the rest of the staff would stay to finish the shipments on hand. Tr. at 491-93, 527-30, 542-51; Exh. 23. Chan also indicated she returned the lease to the landlord and her sister would handle the termination of

equipment leases. *Id*. Chan did not indicate she planned to bring her sister over to Dimerco.

On February 27, 2001, M.B. Hassan and Marcy Rivera traveled to St. Louis to attempt to convince Chan and her staff to stay or, alternatively, to see if Rivera could take over as general manager of the St. Louis office. Tr. at 1122-23. Hassan discovered that Chan and her employees would not stay with Scanwell and that Scanwell's office space had been leased to someone else. Tr. at 1123-27, 1142. Only later did Hassan discover that "someone else" was Dimerco. Tr. at 1147. On March 1, 2001, Chan's resignation became effective and she immediately became Dimerco's general manager. Tr. at 587-89; Exh. 21. Chan never told anyone at Scanwell that she was going to become Dimerco's general manager. Tr. at 520-22, 1123, 1147. Chan instead told Hassan and others that she was taking a long vacation because of her health. *Id*.

In March 2001, with no staff or office space, Scanwell scrambled to reorganize the St. Louis office and handle the St. Louis business from Chicago until a new office could be established. Tr. at 1135-39, 1148-49. Hassan instructed his sales staff to contact all St. Louis customers. *Id*. Scanwell paid the St. Louis staff through March 31, 2001 to help the transition. Tr. at 870-71; Exh. 32. Hassan instructed the remaining staff to have calls to Scanwell's St. Louis phone number forwarded to Chicago. Tr. at 1138-39. When Hassan was out of the country, Chan's sister Sandy and other former Scanwell employees obtained "lay off" letters and letters of recommendation from Hassan's assistant in Chicago, without Hassan's knowledge or approval. Tr. at 1142-46. Hassan eventually discovered Chan and her staff had been working for Dimerco in Scanwell's former office

since April 1, 2001. Tr. at 1146-48. Contrary to Hassan's instructions, the Scanwell staff turned Scanwell's St. Louis phone number over to Dimerco. Tr. at 889-96, 1138-39, 1148. Thus, Scanwell customers who dialed Scanwell's St. Louis number got Dimerco instead. With Dimerco and Chan having taken over Scanwell's St. Louis business operation, Scanwell was effectively precluded from competing in the St. Louis market. Tr. at 980-83, 1150-51.

ARGUMENTS

I. *The Trial Court Did Not Err In Denying Appellants' Motions For Directed Verdict, JNOV, Or New Trial Because Scanwell Made A Submissible Case For Breach Of Fiduciary Duty Against Chan In That Scanwell Proved Chan (1) Owed Scanwell A Fiduciary Duty Of Loyalty By Virtue Of Her Employment As Scanwell's General Manager And (2) Breached That Duty By Conspiring With Dimerco To Convert Scanwell's St. Louis Office Into A Dimerco Office*.

"The standard of review of a denial of a judgment notwithstanding the verdict is essentially the same as for review of a denial of a motion for directed verdict." *First State Bank of St. Charles v. Frankel*, 86 S.W.3d 161, 169 (Mo.App. 2002). The Court cannot reverse a jury verdict "unless there is a complete absence of probative facts to support it". *Id*. The Court must view "the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the plaintiff". *Id*. The Court must presume "that the plaintiff's evidence is true" and disregard "any of the defendant's evidence that does not support the plaintiff's case". *Id*. "Granting a judgment notwithstanding the verdict is a

drastic action that should be done only when reasonable persons could not differ on a correct disposition of the case." *Id*. The Court reviews a denial for a motion for new trial for abuse of discretion. *Missouri Dept. of Transp. ex rel. P.R. Developers Inc. v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 31 (Mo.App. 2002). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so unreasonable and arbitrary as to shock the sense of justice and indicates a lack of judicial consideration". *Id*. (quotes omitted).

In their first argument, Appellants include two separate issues: (1) whether Chan owed Scanwell a fiduciary duty of loyalty and (2) whether she breached that duty.

A. Chan owed Scanwell a fiduciary duty of loyalty as Scanwell's general manager.

Appellants claim Chan owed no fiduciary duty of loyalty to Scanwell because she was a mere "middle manager". Appt. Brief at 29. Appellants cite no authority for this contention. The decisions in Missouri and most other States hold the contrary: that all employees, especially branch managers such as Chan, owe their employers a fiduciary duty of loyalty during their employment.

The rule that all employees owe their employers a fiduciary duty of loyalty was recognized by the Court in *National Rejectors*, where the Court cited with approval the following statements:

> Equally clear is the proposition that the employee owes a duty of loyalty to the employer. He must not, while employed, act contrary to the employer's interests and, in general terms, owes a duty of

> loyalty as one of the incidents of the employer-employee relationship.

National Rejectors Inc. v. Trieman, 409 S.W.2d 1, 41 (Mo.banc 1966). That proposition was reaffirmed by the appellate court in *Pollock*, in which the court recognized that an employee owes a "duty not to compete with her employer during her employment." *Pollock v. Berlin-Wheeler, Inc.*, 112 S.W.3d 73, 78 (Mo. App. 2003).

The principle that an employee owes her employer a duty of loyalty is recognized in the Restatement(Second) of Agency §393, comment e, illustration 1. The Restatement recognizes employees as agents of their employers and thus subject to a fiduciary duty of loyalty. *Id.* §2, comment d. The appellate court in *Dwyer* recognized this section of the Restatement as the law in Missouri and most other States. *Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d 742, 746 (Mo.App. 1993). The court of appeals has recognized that managers owe fiduciary duties of loyalty. *Kantel Commun. Inc. v. Casey*, 865 S.W.2d 685, 692 (Mo.App. 1993) (sales manager owed employer "duty of loyalty").

Courts in other States have ruled employees, and especially branch managers, owe fiduciary duties to their employers. *Herider Farms-El Paso Inc. v. Criswell*, 519 S.W.2d 473, 477 (Tex.App. 1975)("Criswell as manager of Herider's business in El Paso occupied a position which would give rise to the duties of a fiduciary"); *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 935 n.10 (Cal. 1966)(citing Restatement(Second) of Agency §393); *Porth v. Iowa Dept. of Job Service*, 372 N.W.2d 269, 273-74 (Iowa 1985)("an employee who solicits fellow employees to leave their employer in favor of a

competitor breaches the duty of loyalty owed by an employee to his or her employer"); *ABC Trans Nat'l Transport Inc. v. Aeronautics Forwarders Inc.*, 379 N.E.2d 1228, 1237 (1978)("While acting as an agent or employee of another, one owes the duty of fidelity and loyalty"); *American Republic Ins. Co. v. Union Fidelity Life Ins. Co.*, 470 F.2d 820, 824 (9th Cir. 1972)("Lindgren was an employee of American and owed it the usual duty of loyalty"); *Fish v. Adams*, 401 So.2d 843, 845 (Fla.App. 1981)("employee may not engage in disloyal acts in anticipation of his future competition"); *Maryland Metals Inc. v. Mezner*, 382 A.2d 564, 568 (Md. 1978)("we have read into every contract of employment an implied duty that an employee act solely for the benefit of his employer in all matters within the scope of employment, avoiding all conflicts between his duty to the employer and his own self-interest"); *Platinum Mgt. Inc. v. Dahms*, 666 A.2d 1028, 1042 (N.J.Super. 1995)("Although an employee has the right to make preparations to go into a competing business even while he is still employed, he may not breach the undivided duty of loyalty he owes his employer while still employed"); *Duane Jones Co. v. Burke*, 117 N.E.2d 237, 245 (N.Y. 1954)(each of the "defendants-appellants as officers, directors or employees of the plaintiff corporation . . . . was at all times bound to exercise the utmost good faith and loyalty in the performance of his duties"); *Graphic Directions Inc. v. Bush*, 862 P.2d 1020, 1022 (Colo. App. 1993)(" "a duty of loyalty exists between an employer and its employees"); *Huey T. Littleton Claims Service Inc. v. McGuffee*, 497 So.2d 790, 794 (La. App. 1986)("an employee owes his employer a duty to be loyal and faithful to the employer's interest in business"); *Fields v. Thompson Printing Co.*, 363 F.3d 259, 270 (3rd Cir. 2004)("every employee owes a duty of loyalty

to their employer"); *Hilb, Rogal & Hamilton Co. of Richmond v. DePew*, 440 S.E.2d 918, 921 (Va. 1994)("an employee's fiduciary duty to his employer prohibits the employee from acting in a manner adverse to his employer's interest"). The New Jersey Supreme Court described the duty in this manner:

> Loyalty from an employee to an employer consists of certain very basic and common sense obligations. An employee must not while employed act contrary to the employer's interest. And, during the period of employment, an employee has a duty not to compete with his or her employer.

Lamorte Burns & Co. v. Walters, 770 A.2d 1158, 1168 (N.J. 2001)(cites omitted).

Contrary to Appellants' claim, *see* Appt. Brief at 32, no court has limited the fiduciary duty of loyalty to employees who were officers and directors. That limitation does not appear in the principles quoted in *National Rejectors* and *Pollock*. The sales manager in *Kantel* was not an officer or director of the employer, nor even a branch or general manager, but merely a sales manager. *Kantel*, 865 S.W.2d at 688. The non-Missouri cases cited above do not limit an employee's duty of loyalty to officers and directors. Other courts outside Missouri have explicitly rejected that limitation. *Regal-Beloit Corp. v. Drecoll* 955 F.Supp. 849, 857-58 (N.D. Ill. 1996)("duty of good faith and loyalty is not limited to managers and board members"; "all employees owe their employers a fiduciary duty of loyalty with respect to any and all matters within the scope of their agency"); *Futch v. McAllister Towing of Georgetown Inc.*, 518 S.E.2d 591, 594 n.1 (S.C. 1999)(terms "employee" and "agent" are essentially interchangeable, to whom the duty of loyalty applied with equal force); *Arnold's Ice Cream Co. v. Carlson*, 330

F.Supp. 1185, 1188 (E.D.N.Y. 1971)("Employees owe a fiduciary duty to their employer even though they may not be officers or directors"), citing *Tinsley v. Mavala Inc.*, 226 F.Supp. 477 (S.D.N.Y. 1964), *Republic Sys. & Programming Inc. v. Computer Assistance Inc.*, 322 F.Supp. 619 (D.Conn. 1970). The Restatement also does not limit the fiduciary duties owed by employees to corporate officers or directors. Restatement(Second) of Agency § 2, comment a.

Appellants confuse this issue by attempting to distinguish the duty of loyalty owed by all employees as recognized by these cases from general "fiduciary duties". Appt. Brief at 30, 32, 33, 34.[3] That is an invalid distinction, as Missouri courts have consistently recognized the duty of loyalty as a, if not the predominant, fiduciary duty. This Court recognized the duty of loyalty as a fiduciary duty. *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997); *Snowwhite v. Metropolitan Life Ins. Co.*, 127 S.W.2d 718, 721 (Mo. 1939). The appellate courts likewise have recognized the duty of loyalty as "the most fundamental" of the fiduciary duties. *John R. Boyce Family Trust v. Snyder*, 128 S.W.3d 630, 636 (Mo.App. 2004); *Ramsey v. Boatmen's First Nat'l Bank of Kansas City NA*, 914 S.W.2d 384, 387 (Mo.App. 1996). The court in *Pollock* explicitly recognized the employee's duty as a fiduciary duty. *Pollock*, 112 S.W.3d at 79 ("An employee's fiduciary duty . . . is a constructive term of every employment contract").

[3] Appellants' contention that the duty of loyalty is not a fiduciary duty seems belied by their reference to the "fiduciary duty of loyalty" in their proposed instruction. Appt. Brief at 64.

Courts that have required more than mere employment to vest the employee with fiduciary duties have found the duties to arise when the employer has placed trust and confidence in the employee. *Chelsea Indus. Inc. v. Gaffney*, 449 N.E.2d 320, 326 (Mass. 1983) ("Employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer"); *Kendall/Hunt Publ. Co. v. Rowe*, 424 N.W.2d 235, 243 (Iowa 1988)(fiduciary relationship "exists when there is a reposing of faith, confidence, and trust, and the placing of reliance by one upon the judgment and advice of the other"); *Safeway Transp. Inc. v. West Chambers Transp. Inc.*, 100 F.Supp.2d 442, 445 (S.D. Tex. 2000)("the law recognizes the existence of confidential relationships in those cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed"). Other courts, however, have held that the relationship of trust and confidence arises *per se* from the employment relationship. *Regal-Beloit*, 955 F.Supp. at 858 ("The very relation implies that the principal has reposed some trust and confidence in the agent"); *Maryland Metals*, 382 A.2d at 572.

Imposing fiduciary duties on those in whom trust and confidence have been reposed comports with Missouri decisions in non-employee cases. *Shervin v. Huntleigh Securities Corp.*, 85 S.W.3d 737, 741 (Mo.App. 2002)("The question in determining whether a fiduciary or confidential relationship exists is whether or not trust is reposed with respect to property or the business affairs of the other"); *Lesh v. Lesh*, 718 S.W.2d 529, 533 (Mo.App. 1986)("A confidential relationship is established when one reposes trust and confidence in another in the handling of certain business affairs"); *Robertson v.*

Robertson, 15 S.W.3d 407, 412 (Mo.App. 2000)(in undue influence case, confidential or fiduciary relationship established when trust reposed); *Schimmer v. H.W. Freeman Constr. Co.*, 607 S.W.2d 767, 770 (Mo.App. 1980)("The question is always whether or not trust is reposed with respect to property or business affairs of the other").[4]

Under any of these standards, Scanwell presented sufficient evidence upon which the jury found Chan owed a fiduciary duty of loyalty to Scanwell. The fact that Chan was employed as Scanwell's employee, indeed general manager of Scanwell's St. Louis office, was undisputed. The facts concerning the trust and confidence Scanwell reposed in Chan to run its St. Louis operations also were not disputed (although Appellants attempted to diminish their effect). Scanwell hired Chan to establish and operate its St. Louis business. Chan was Scanwell's highest ranking employee in St. Louis. Chan had complete authority to manage and operate the business and was responsible for its profits and losses. Chan hired all the employees and negotiated and executed all contracts for the St. Louis office. *Supra* at 9 - 10. M.B. Hassan, Chan's immediate superior so trusted Chan's decisions that he effectively rubber-stamped all her actions. Tr. at 1101. Scanwell entrusted Chan with access to its confidential financial information and SOPs. Tr. at 218-40, 944-48, 1104-05. As a matter of law and fact, Chan owed Scanwell a fiduciary duty of loyalty.

[4] Contrary to Appellants' assertion, these cases do not require *special* trust and confidence reposed in the employee. *Cf.* Appt. Brief at 33.

B. Chan breached her duty of loyalty to Scanwell during her employment.

What constitutes a breach of an employee's fiduciary duty of loyalty should not require definition. Simply, any "act contrary to the employer's interest" is a breach of that duty. *See National Rejectors*, 409 S.W.2d at 41. The Restatement provides an example of such disloyalty:

> 1. A is employed by P as manager for a year. Before the end of the year, A decides to go into business for himself; in anticipation of this and without P's knowledge, he contracts with the best of P's employees to work for him at the end of the year. At the end of the year, A engages in a competing business and employs the persons with whom he has previously contracted. A has committed a breach of his duty of loyalty to P.

Restatement(Second) of Agency § 393, illustration 1. The Restatement recognizes an employee can make arrangements to compete before terminating her employment, but cannot "use confidential information peculiar to [her] employer's business and acquired therein." *Id.*, comment e. She can purchase a rival business, but cannot during her employment solicit customers for her own business nor "do other similar acts in direct competition with the employer's business." *Id.*

The Restatement recognizes the conflict in public policy between protecting the interests of employers and employees, which was described by the Court in *National Rejectors* as follows:

> On the one hand there is the deeply imbedded tradition that favors the protection of a person's property interest in his business from unfair

> competition. What a person has labored for should be protected from wrongs by others. On the other hand there is the equally strong, if not stronger policy which favors free competition in the economic sphere of our society. As a corollary a person has the right to improve his socioeconomic status, even if the resulting effect is somewhat detrimental to the business interest of his former employer. It is necessary that there be a balancing of the equities between these two rights, for if the former is carried to its extreme it will deprive a man of his right to earn a living; while conversely, the latter right if unchecked, would probably make a mockery of the fiduciary concept, with its concomitants of loyalty and fair play.

National Rejectors, 409 S.W.2d at 39. More recently, the Maryland court of appeals described the conflict in this manner:

> The first of these policy considerations is that commercial competition must be conducted according to basic rules of honesty and fair dealing. . . . Fairness dictates that an employee not be permitted to exploit the trust of his employer so as to obtain an unfair advantage in competing with the employer in a matter concerning the latter's business. . . . Thus, we have read into every contract of employment an implied duty that an employee act solely for the benefit of his employer in all matters within the scope of employment, avoiding all conflicts between his duty to the employer and his own self-interest. . . . The second policy recognized by the courts is that

> of safeguarding society's interest in fostering free and vigorous competition in the economic sphere. . . . This policy in favor of free competition has prompted the recognition of a privilege in favor of employees which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty.

Maryland Metals, 382 A.2d at 568-69. *See also Futch*, 518 S.E.2d at 606-07; *Graphic*, 862 P.2d at 1023; *Huey*, 497 S.2d at 793.

Where specific conduct falls between fair and unfair competition by an employee, *i.e.*, performance or breach of the employee's duty of loyalty, cannot be stated as a matter of law. "[T]he line separating mere preparation from active competition may be difficult to discern in some cases." *Futch*, 518 S.E.2d at 607; *Maryland Metals*, 382 A.2d at 569. As this Court noted, "Each case of this nature must be decided upon its particular facts." *National Rejectors*, 409 S.W.2d at 40. The decision of whether specific conduct falls on the side of fair or unfair competition is a question of fact for the jury to decide, and the jury in this case decided Chan's and Dimerco's conduct was unfair and a breach of Chan's duty of loyalty. The only question for this Court on review is whether Scanwell provided sufficient evidence for the jury's verdict.

The conduct Scanwell submitted to the jury as breaching the duty of loyalty was that Chan, while Scanwell's general manager, made arrangements to have Dimerco take over Scanwell's business operation including securing Scanwell's business lease for Dimerco and disclosing Scanwell's confidential information to Dimerco. L.F. at 49, 54. It

is not apparent whether Appellants contend such acts do not constitute disloyalty by Chan or whether Appellants merely contend there was insufficient evidence to support the jury's finding that Chan committed those acts. It seems self-evident that a general manager who conspires to turn her employer's office into an office of her competitor is acting against her employer's interest and is not merely planning to go into business on her own after terminating her employment.

Scanwell's evidence sufficiently supported the jury's verdict. *Supra* at 10 - 14. Ten months before she quit, Chan began secretly negotiating with Dimerco to take over Scanwell's office, including its phone number, lease, employees, equipment, furniture, confidential information and customer base. Chan gave Dimerco a tour of Scanwell's St. Louis office, the office she intended to turn over to Dimerco. No loyal employee would invite a competitor to tour her employer's office. Chan gave Dimerco business proposals and establishment plans for taking over Scanwell's business. Chan gave Dimerco Scanwell's confidential customer profile (SOP) of its largest customer, which included pricing, special handling requirements, contact information, and freight history. Chan advised one of her biggest customers to visit Dimerco's Shanghai office. Chan arranged for the early termination of Scanwell's lease and for Dimerco to take over that space. The advantage to Dimerco of taking over the office and phone numbers of its competitor is obvious. That Scanwell's own employee arranged for that while employed by Scanwell, indeed employed as the general manager of that office, provided the jury ample evidence on which to find against Chan and Dimerco. Appellants' reference to other facts or

arguments regarding the meaning of these facts were for the jury and are irrelevant on appeal of the jury's verdict. *First State*, 86 S.W.3d at 169.

Appellants' reliance on the facts and conclusion of *National Rejectors* is misplaced. That case concerned claims of misappropriation of trade secrets and an injunction that prohibited the defendant employees from competing against their former employer. *National Rejectors*, 408 S.W.2d at 7. The Court determined the injunction was improper because the plaintiff failed to prove the information the defendants took constituted trade secrets, the employer hesitated in acting when it learned of defendants' activities, the effect of the injunction was to extend a monopoly on production of a machine for which the patent had expired, and the injunction damaged most seriously individuals who were not parties to or knew of defendants' misconduct. *Id.* at 39-40. The Court did not absolve the defendants of wrongdoing, but instead remanded the case for trial on the damages to be awarded the employer for the employees' misconduct. *Id*. at 44, 54.

In contrast to the defendants in *National Rejectors*, Chan went beyond merely planning to compete against Scanwell. She delivered the office over which she had charge as her employer's general manager to her employer's competitor. Her conduct during her employment at Scanwell was "designed to cloak in secrecy a conspiratorial venture to undermine" her employer. *Id.* at 26.

Chan's conduct is distinct from that allowed in *Dwyer*. *Cf.* Appt. Brief at 30, 38. In *Dwyer* the court held that an accountant could not be held liable for making preparations to leave his firm to form a new firm while he was still an officer and director of the

corporation. *Dwyer*, 846 S.W.2d at 75. The court determined defendant was not liable for damages "simply because he solicited the business of some of plaintiff's clients before the date on which he made his resignation effective" and found further "[t]he evidence shows no such contact with clients before the defendant advised the plaintiff of his decision to resign and to enter into his own accounting practice, and then nothing beyond advice to the clients that defendant was no longer affiliated with plaintiff, coupled with the statement of willingness to serve future accounting needs". *Id*. at 748.

Chan not only solicited customers for business in behalf of Dimerco before announcing her resignation, she did so while on business trips on behalf of Scanwell and at its expense. In *Dwyer*, the defendant notified his employer before the effective date of his resignation that he intended to enter into his own accounting practice. Chan lied to Scanwell about her intentions. The *Dwyer* court held that "[m]ere preparation to leave a business organization so as to enter into competition is not sufficient to support liability". *Id*. at 747. Chan did not merely prepare to go off on her own and compete against Scanwell. The *Dwyer* court also stated "activities such as renting office space . . . do not *necessarily* lead to a finding of liability". *Id*. (emphasis added). Chan did not just rent office space for Dimerco, she rented Scanwell's office space as part of her plan to turn over Scanwell's entire St. Louis operation to its competitor.

The cases *Dwyer* cites in distinction more aptly describe Chan's conduct. *See*, *Smith-Shrader Co. v. Smith*, 483 N.E.2d 283, 285-88 (Ill.App. 1985)(defendant solicited customers for business while on a business trip for plaintiff and sought to have suppliers breach their contracts with the plaintiff); *ABC Trans.*, 379 N.E.2d at 1230-36 (activity

over several months including misrepresentations to employees, use of customer lists and interference with contract relations); *H. Vincent Allen & Assoc. Inc. v. Weis*, 379 N.E. 2d 765, 769 (Ill.App. 1978)(defendant solicited principal customer of plaintiff while actively employed by plaintiff.) In distinguishing these cases, the *Dwyer* court found that "[a]ll demonstrate clandestine activities by the several defendants for their own benefit, while drawing compensation for full time employment with the plaintiff". *Id*. at 749. That describes Chan's conduct while she was Scanwell's general manager.

Chan's conduct also resembles the defendant's in *Kantel* wherein the court held that a former sales manager violated his duty of loyalty to an employer when he represented himself as the employer's agent while acting in behalf of a competitor. *Kantel*, 865 S.W.2d at 692. The *Kantel* court found that the sales manager was actively sabotaging an agreement with a customer so that a competitor could obtain the contract for itself. *Id*. The competitor also participated in and took advantage of the sales manager's disloyalty. *Id*. at 693.

Scanwell provided ample evidence that Chan conspired with Dimerco while she was Scanwell's general manager to convert Scanwell's St. Louis office into the St. Louis office of its competitor.[5] Such conduct was clearly disloyal and contrary to Scanwell's interests. Consequently, Chan breached the fiduciary duty of loyalty she owed Scanwell

[5] Appellants' interpretation of that evidence and contradictory evidence is irrelevant to this point. *First State*, 86 S.W.3d at 169.

as its general manager. The jury properly found Chan liable for breach of fiduciary duties and the trial court correctly denied Appellants' post-trial motions.

II. *The Trial Court Did Not Err In Denying Appellants' Motions For Directed Verdict, JNOV, Or New Trial On The Issue Of Damages Because Scanwell Presented Substantial Evidence Of Damages In That Respondent Proved It Suffered Pecuniary Harm Measured By The Diminution In The Value Of Its Business As A Result Of Appellants' Misconduct*.

Appellants claim that the trial court erred in denying their post-trial motions because Scanwell failed to present evidence of damages. The standard of review of this point is the same as Point I. *See supra* at 14. The trial court submitted damage instructions under MAI 4.01. L.F. at 52, 56. These instructions asked the jury to "award such sum as you believe will fairly and justly compensate [Scanwell] for any damages you believe [Scanwell] sustained as a direct result of the occurrence mentioned in the evidence". *Id.*

"The assessment of damages is primarily the function of the jury." *First State*, 86 S.W.3d at 171. "The purpose of an award of damages is to make the injured party whole by monetary compensation." *Turner v. Shalberg*, 70 S.W.3d 653, 658 (Mo.App. 2002). Appellants essentially converted Scanwell's business and, therefore, the proper monetary compensation to Scanwell was the fair market value at the time of the conversion. *Bell v. Lafont Auto Sales*, 85 S.W.3d 50, 54 (Mo.App. 2002). "[T]he value of an ongoing business may exceed the value of the 'hard assets' of the business, as intangibles . . . also may be valued." *Turner*, 70 S.W.3d at 658.

Scanwell presented substantial evidence that its St. Louis business operation lost all of its value from Appellants' takeover of that operation. Contrary to Appellants' assertions, the loss to Scanwell was not merely its office lease, but its entire St. Louis presence including the office space, phone number, equipment, employees, customers, and confidential information.

Scanwell's expert calculated the fair market value of Scanwell's St. Louis operation as of the misappropriation. Tr. at 1334; Exh. 62. Scanwell's expert capitalized the net cash flow for the operation, which indicated the expected future profits of the business. This was a standard method in determining fair market value for purposes of damage calculations. *Id*. The damage theory was based on the premise that, had Dimerco purchased Scanwell's business instead of stealing it through Chan, it would have paid $479,000. Tr. at 1370; Exh. 62. The jury awarded $308,000, evidently agreeing with most, but not all of the value suggested by Scanwell's expert. L.F. at 109-10, 112. Appellants' conjecture as to how the jury came to that amount is irrelevant. *Heins Implement Co. v. Missouri Highway & Transp. Comm'n*, 859 S.W.2d 681, 692 (Mo.banc 1993) (opinion of single qualified witness is sufficient; amount of verdict not matching opinion of expert not basis for reversal).

Because there was substantial evidence for the jury's assessment of damages against Appellants, the trial court did not err in denying Appellants' post-trial motions on the issue of proof of damages.

III. *The Trial Court Did Not Err In Denying Dimerco's Motions For Remittitur Or New Trial On The Issue Of Damages Because Dimerco Waived Any Claim That The Jury Verdicts Were Inconsistent In That Dimerco Failed To Present That Issue To The Trial Court Before The Jury Was Discharged And Because The Damage Verdicts Were Proper In That They Were Consistent And Supported By Substantial Evidence*.

The denial of a motion for new trial is reviewed for abuse of discretion. *Safeco*, 97 S.W.3d at 31. "A trial court has broad discretion in ordering remittitur, and its decision whether to reduce damages awarded by a jury will not be disturbed on appeal unless there is an abuse of discretion that is so exceedingly excessive that it shocks the conscience and convinces an appellate court that both the trial court and the jury have abused their discretion." *Id*. at 40.

Dimerco appears to challenge the damage awards against Chan and Dimerco for being inconsistent. Dimerco waived that argument because it did not present the argument to the trial court before the jury was discharged. *Douglass v. Safire*, 712 S.W.2d 373, 374 (Mo.banc 1986). Dimerco also failed to object to the verdict forms. Tr. at 1754-55, 1758-59; *Blackstock v. Kohn,* 994 S.W.2d 947, 953 (Mo.banc 1999).

Even had Dimerco presented this argument, the trial court properly would have denied remittitur because the verdicts were not inconsistent and were supported by Scanwell's evidence. The jury found Scanwell was damaged in the amount of $308,000 from Appellants' misconduct. The jury merely apportioned the damages between Dimerco and Chan on the basis of their relative culpability, as the jury had done in the

conspiracy case of *Haynes v. Hawkeye Security Ins. Co.*, 579 S.W.2d 693, 704 (Mo.App. 1979). Chan and Dimerco were jointly and severally liable for all damages Scanwell suffered from their conspiracy. *Gettings v. Farr*, 41 S.W.3d 539, 541 (Mo.App. 2001) The trial court therefore properly combined the jury's apportioned damages into a single damage amount and entered judgment for that amount against Chan and Dimerco jointly and severally.

IV. *The Trial Court Did Not Err In Denying Appellants' Motion For Mistrial Or New Trial On The Grounds Of Closing Arguments Because Appellants Were Not Unfairly Prejudiced By Respondent's Argument In That The Statements Were Inferences That Could Reasonably Have Been Drawn From The Evidence Presented To The Jury*.

"The trial court is accorded broad discretion in ruling on the propriety of a closing argument to the jury and will suffer reversal only for an abuse of discretion." *Moore v. Missouri Pacific R.R. Co.*, 825 S.W.2d 839, 844 (Mo.banc 1992). "Counsel is traditionally given wide latitude to suggest inferences from the evidence on closing argument." *Nelson v. Waxman*, 9 S.W.3d 601, 606 (Mo.banc 2000). This is true even though the inferences drawn may seem "illogical or erroneous". *Id.* at 606. "A mistrial is a drastic remedy, and the decision to grant one . . . is largely within the discretion of the trial court." *Cole v. Warren County R3 School Dist.*, 23 S.W.3d 756, 759 (Mo.App. 2000).

One issue at trial was the failure of Appellants to timely produce an inculpatory internal memorandum of Dimerco that detailed the conspiracy between Dimerco and

Chan to take over Scanwell's business. Exhs. 1, 1A. A related issue involved the timing of the substitution of Appellants' attorneys and its relation to the tardy production of Dimerco's memorandum. At trial Dimerco's President, Anthony Tien, testified at length about why he failed to timely produce the memorandum and the timing of Appellants' replacement of their attorneys. Tien blamed his failure to produce the memorandum on Dimerco's former attorney. Tien testified as follows:

> Q. Now, the proposal, sir, was given to me two minutes before your deposition in this case; is that right?
>
> A. Yes.
>
> Q. And there had been pending for several months a request for production of documents; you were aware of that, right, sir?
>
> A. Yes.
>
> Q. And you didn't produce this to me till literally right before we started your deposition; is that right?
>
> A. Yes.
>
> Q. Okay. And what was the reason for that, sir?
>
> A. The reason for that?
>
> Q. The reason for not producing this document that had been requested until right before your deposition.
>
> A. That I don't know. Because the same material we went through with the previous counsel Heimos but he didn't pick this one.
>
> * * * *

Q. Do you remember me taking your deposition, sir?

A. Yes.

Q. And do you remember me asking you the questions as to why you did not produce that during that, sir?

A. Yes.

Q. I want to direct the Court's and the counsel's attention to Mr. Tien's deposition on page 17 and 18.

* * * *

A. Page 17, line 24.

Q. "I want to know why this document wasn't produced prior to today or given to your counsel prior to, what, yesterday.

"Probably I forgot.

"You forgot?

"Uh-huh."

Do you remember that?

A. Yes.

Q. So this is -- you knew at the time that these documents were requested that Scanwell was claiming that you and Stevie Chan conspired to steal the business; is that right? You knew that is what the allegations were? I am not asking you to agree. I'm saying you knew of that, the claim, right?

A. Yes.

Q. And this is the business plan for setting up the whole office, right?

A. Yes.

Q. And you forgot to produce it to me, right, sir or did you misspeak in your deposition?

A. Well, I believe that I talked about it with Heimos.

Q. David Heimos was the attorney representing both you and Stevie?

A. Yes.

Q. Before he was fired and you hired the two big law firms, correct, sir?

A. Yes.

Tr. at 171-174.

In cross-examination Dimerco interjected the issue of switching law firms. Tr. at 366-367. On redirect, Mr. Tien expanded on that issue:

Q. Okay. Let's talk about that. You had a lawyer in this case, right, before Mr. Winters?

A. Right.

Q. And he represented both you and Stevie, right?

A. Right.

Q. And that relationship with that lawyer was terminated, right?

A. Right.

Q. And then you hired -- Well, then Dimerco hired Mr. Winters' firm and Stevie hired Thompson & Coburn and Mrs. Bonacorsi's firm, right?

A. Right.

Q. So you changed lawyers, right?

A. Because he wasn't that great.

Q. Because he wasn't that great?

A. Yes.

Tr. at 407-08.

This testimony put in issue Tien's motives for concealing the memorandum, then revealing the document and firing his attorney and bringing on two new law firms. Appellants did not object to that testimony. Scanwell had every right to argue that there was a correlation between the untimely production of inculpatory evidence and Appellants' change of attorneys. Appellant's contention that this argument had the effect of portraying Scanwell, a multimillion dollar international conglomerate, as a "poor man" is preposterous. *Cf*. Appt. Brief at 54-57.

The trial court found nothing improper in Scanwell's closing argument and denied Appellants' motion for mistrial.[6] The trial court was in the best position to determine the propriety of Scanwell's closing argument and did not abuse its discretion in denying Appellants' motions. *See Giddens v. Kansas City Southern Ry. Co*., 937 S.W.2d 300, 309 (Mo.App. 1996)("Deference is given to the better position of the trial judge to evaluate the prejudicial effect of the overall tenor of the closing argument").

[6] Appellants' counsel merely moved for a mistrial and never requested that the court instruct the jury to disregard any statements Appellants believed to be improper.

V. *The Trial Court Did Not Err In Submitting Instructions 7 And 12 To The Jury Because Appellants Waived Their Objections And Because The Instructions Did Not Constitute Roving Commissions In That The Instructions Properly Stated The Elements For Breach Of Fiduciary Duty And Conspiracy To Breach Fiduciary Duty, Did Not Mislead, Misdirect Or Confuse The Jury, And Did Not Prejudice Appellants*.

In its fifth argument, Appellants contend Instructions 7 and 12 gave the jury a roving commission in failing to state the facts the jury had to find in order to impose a duty of loyalty upon Chan (first paragraph) and in improperly using the term "including" in the second paragraph. Appellants did not distinctly state those objections or the grounds for those objections at the instruction conference. Tr. at 1748:9 - 1750:3 (Instr. 7), 1755:13 - 1757:13 (Instr. 12). Consequently, Appellants waived those objections on appeal. Mo.R.Civ.P. 70.03; *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo.banc 1999).

Even were the Court to consider Appellants' arguments, they are without merit. "Whether or not a jury was properly instructed is a question of law." *First State*, 86 S.W.3d at 173. The Court cannot reverse a verdict due to instructional error unless "the instruction misled, misdirected or confused the jury and the instruction resulted in prejudicial error". *Safeco*, 97 S.W.3d at 31. "A non-MAI instruction must be simple, brief, impartial, free from argument and not submit to the jury or require findings of detailed evidentiary facts." *First State*, 86 S.W.3d at 173; Mo.R.Civ.P. 70.02(b). Instruction 7 submitted the elements of breach of fiduciary duty in accordance with *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 381 (Mo.App. 2000).

A. First Paragraph - Duty of loyalty.

Appellants contend the first paragraph of Instructions 7 and 12 failed to specify the facts the jury was required to find in order for Chan to have owed Scanwell a duty of loyalty. That paragraph stated, "First, Defendant Stevie Chan, the General Manager of Plaintiff, owed a duty of loyalty to Plaintiff". L.F. at 49

The only fact necessary to impose a duty of loyalty on Chan was that she was employed by Scanwell as its general manager. *See supra* at 15 - 21. Appellants conceded that fact. As such she owed Scanwell a fiduciary duty of loyalty.[7] The first paragraph of the instructions thus was superfluous and not prejudicial to Appellants. Submitting to the jury the question of whether Chan owed a duty of loyalty in addition to being general manager prejudiced only Scanwell, since it provided the jury an opportunity to find against Scanwell if they believed Chan did not owe a duty of loyalty despite her employment as general manager.

Although Appellants do not raise the point, the appellate court held that "duty of loyalty" should have been defined. *Scanwell Freight Express STL Inc. v. Chan*, No. ED83035, slip op. at 5-6 (March 30, 2004). That opinion is incorrect and conflicts with *Brock v. Firemens Fund Of America Ins. Co.*, 637 S.W.2d 824 (Mo.App. 1982), which held "the meaning of ordinary words used in their usual or conventional sense need not be defined for the jury, since the average juror would commonly understand their meaning." *Id.* at 827. *See also Rice v. Bol*, 116 S.W.3d 599, 609 (Mo.App. 2003)("while

[7] Appellants seem to concede Chan owed a duty of loyalty. *See* Appt. Brief at 34, 65.

the trial court must define legal or technical terms, it need not define non-technical, readily understood words or commonly used words"). MAI confirms this by requiring definitions only of "legalese" and not common terms. MAI 6th (2002) at LVII. This Court's definition of loyalty, "not . . . [to] act contrary to the employer's interest", *National Rejectors*, 409 S.W.2d at 41, is the same as the common, dictionary definition of loyalty, or being faithful. *See, e.g.*, Webster's New Twentieth Century Dictionary at 1072 (2d ed. 1983); Black's Law Dictionary at 854 (5th ed. 1979). Consequently, by law it would have been improper to define "duty of loyalty" for the jury and the appellate court's opinion to the contrary is incorrect.

B. Second Paragraph - Use of the word "including".

Appellants contend it is error to use the word "including" in a jury instruction. Appellants cite no case that has yet barred that word from jury instructions. Appellants provide no compelling reason why this Court should set that precedent. The second paragraph stated:

> Second, during her employment with Plaintiff, Defendant Stevie Chan made arrangements to have Defendant Dimerco take over Plaintiff's business operation including securing Plaintiff's business lease for Defendant Dimerco, disclosing confidential information of Plaintiff to Dimerco.

L.F. at 49. This paragraph posited the ultimate fact on which Scanwell based its claim that Chan breached her duty of loyalty: arranging during her employment as general manager to have Dimerco take over Scanwell's business. It is not clear whether

Appellants contend that fact is insufficient to constitute a breach of fiduciary duty. Scanwell contends that is disloyal and contrary to an employer's interest. Within the context of the paragraph, the jury could not reasonably have construed the term "including" to allow consideration of evidence beyond that relating to the Dimerco take-over, and specifically Chan's efforts to secure Scanwell's lease for Dimerco and providing Scanwell's confidential information to Dimerco.[8]

The word "including" can be "used restrictively in the sense of its synonyms 'comprising; comprehending; embracing,' and not as introducing elements constituting an enlargement". *State ex rel. Huffman v. Sho-Me Power Co-op.*, 191 S.W.2d 971, 977 (Mo.banc 1946). This follows the dictionary definition of "including" as meaning "to contain, comprise" or "embrace, inclose". *See* Webster's New Twentieth Century Dictionary at 923 (2d ed. 1983). MAI recognizes and allows use of the analogous phrase "such as". See MAI 21.05. That phrase is defined as merely providing examples, see e.g. Webster's New Twentieth Century Dictionary at 1819 (2nd ed. 1983), and is thus even more expansive than "including".

Appellants contend "including" can be understood only to be expansive and not restrictive, indicating that what follows is part of a larger group or category. Were that so,

[8] Scanwell originally submitted an instruction that included more details supporting its claim of disloyalty. L.F. at 71; Tr. at 1748-50. The Court's rejection of that instruction only prejudiced Scanwell by limiting the facts for the jury to consider in deciding whether Chan was disloyal.

there would be no need for the phrase "including without limitation". *Cf., e.g., McKinney v. HMKG & C Inc.*, 123 S.W.3d 274, 281 n.7 (Mo.App. 2003); *State ex rel. EA Martin Machinery Co. v. Line One Inc.*, 111 S.W.3d 924, 929 (Mo.App. 2003); *Anderson v. Curators of University of Mo.*, 103 S.W.3d 394, 396-97 (Mo.App. 2003); *Sabatino v. LaSalle Bank NA*, 96 S.W.3d 113, 114 (Mo.App. 2003); *Moto Inc. v. Board of Adjustment*, 88 S.W.3d 96, 101 (Mo.App. 2002).

Appellants' cases do not support their argument. In *Seitz* the Court approved an instruction that was similar in structure to Scanwell's. *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 462-64 (Mo.banc 1998). In *Davis* the instruction referred to defendant's "conduct" and did not specify the particular conduct on which plaintiff relied for that element. *Davis v. Jefferson Sav. & Loan Ass'n*, 820 S.W.2d 549, 556 (Mo.App. 1991). In *Centerre*, the instruction referred to an "agreement" but did not specify the agreement, among many between the parties, to which it referred. *Centerre Bank of Kansas City NA v. Angle*, 976 S.W.2d 608, 617-18 (Mo.App. 1998). Scanwell's instruction did not refer merely to Chan's "conduct" or an undefined "agreement", but referred instead specifically to Chan's efforts to have Dimerco take over Scanwell's business operation, of which there was ample evidence.

Instructions 7 and 12 properly submitted to the jury Scanwell's claims for breach of fiduciary duty and conspiracy. Mo.R.Civ.P. 70.02(b). The trial court properly denied Appellants' post-trial motions regarding those instructions, even disregarding Appellants' failure to properly object to the instructions.

VI. *The Trial Court Did Not Err In Submitting Instruction 9 Because That Instruction Accurately Stated The Law And Was Not Prejudicial In That It Correctly Defined A Fiduciary Relationship As Arising When Trust And Confidence Is Reposed In The Handling Of Certain Business Affairs*.

Instruction 9 stated: "A fiduciary relationship is established when one reposes trust and confidence in another in the handling of certain business affairs". L.F. at 51. The Court may reverse a judgment for instructional error only if the error was prejudicial. *First State*, 86 S.W.3d at 173.

Instruction 9 was not prejudicial because it was unnecessary, in that "fiduciary relationship" was not included in any element of Scanwell's verdict directing instructions and thus did not need definition. Moreover, Chan's employment as Scanwell's general manager, a fact not in dispute, itself created the fiduciary relationship from which Chan's duty of loyalty to Scanwell arose. *See supra* at 15 - 21.

Instruction 9 correctly stated the law as to when a fiduciary relationship arises generally. "The question in determining whether a fiduciary relationship exists is whether or not trust is reposed with respect to property or business affairs of the other," *Shervin*, 85 S.W.3d at 741 (husband, wife, and brokerage). "The question is always whether or not trust is reposed with respect to property or business affairs of the other." *Id.*; *Schimmer*, 607 S.W.2d at 770 (realtor and homeowner). "A confidential relationship is established when one reposes trust and confidence in another in the handling of certain business

affairs." *Lesh*, 718 S.W.2d at 533 (family members, undue influence); *Robertson*, 15 S.W.3d at 412 (family members, undue influence).[9]

Appellants cite no case involving an employer and employee in which a court required the employee to have gained superiority and influence over her employer in order to owe fiduciary duties. Scanwell has cited numerous cases outside Missouri that require only that the employer have reposed trust and confidence in the employee. *Supra* at 20.

Appellants' definition requiring an employee to have gained superiority and influence over her employer to owe any fiduciary duty is excessively restrictive. That definition would preclude any verdict for a corporate employer for breach of fiduciary duty by an employee because an employee rarely gains superiority and influence over the corporation that employs her. Any corporate employee who had a superior to report to, such as Chan, would by definition not have gained superiority over her employer because she answered to a superior corporate officer. Indeed, only chief executive officers, having no superior officer to report to, would owe fiduciary duties to their corporate employers under Appellants' definition. That radically alters the law on employer-employee relations in this State and eviscerates this Court's decision in *National Rejectors*. The Court should reject that argument.

[9] The district court's statement in *Horwitz* was dictum because the cause was dismissed on ground of collateral estoppel. *Horwitz v. Horwitz*, 16 S.W.3d 599, 603-04 (Mo.App. 2000)(husband and wife).

Because instruction 9 properly stated the general law for establishing a fiduciary relationship and was unnecessary, the instruction was not erroneous or prejudicial.

VII. *The Trial Court Did Not Err In Denying Dimerco's Motions For Directed Verdict, JNOV, Or New Trial On Scanwell's Claim For Conspiracy Because Scanwell Made A Submissible Case In That It Presented Substantial Evidence Of An Agreement Between Dimerco And Chan To Take Over Scanwell's Business In Breach Of Chan's Fiduciary Duty Of Loyalty To Scanwell.*

The standard of review of this point is the same as for Point I. *Supra* at 14. "A claim for civil conspiracy must establish that: (1) two or more persons; (2) with a unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged." *Getting*, 41 S.W.3d at 542. Scanwell presented substantial evidence that Chan and Dimerco entered into an agreement to take over Scanwell's St. Louis business operation and acted on their agreement to Scanwell's damage. *See supra* at 10 - 14. Dimerco's internal memorandum details the conspiracy between Chan and Dimerco to misappropriate Scanwell's business. Exhs. 1, 1A (App. at A6-A18). Dimerco's arguments regarding the meaning of the evidence Scanwell presented were for the jury and are irrelevant on appeal. *First State,* 86 S.W.3d at 169. The jury rejected those arguments and their decisions regarding witness credibility and Dimerco's explanations of its conduct cannot be reversed. *Thayer v. Sommer*, 356 S.W.2d 72, 77-78 (Mo. 1962) . The trial court properly denied Dimerco's post-trial motions on this issue.

CONCLUSION

This case does not involve the right of an at-will employee to leave her employer and start a new competing business or go to work for a competitor. This case involves a detailed plan between Scanwell's general manager of its St. Louis operations and Scanwell's competitor to not only establish a competing business but to take over Scanwell's entire St. Louis business operation, all while the general manager remained employed by Scanwell. Chan owed a fiduciary duty of loyalty to Scanwell by virtue of her employment as Scanwell's general manager. Chan breached that duty by working to convert her employer's branch office into a branch office of her employer's competitor. Dimerco conspired and worked with Chan to effect that breach. Because of the conversion of its entire St. Louis operation, Scanwell was damaged in the amount of the fair market value of its St. Louis operation business. The trial court's instructions properly instructed the jury on the elements of Scanwell's claims against Chan and Dimerco and Appellants were not prejudiced by those instructions. The jury properly found in favor of Scanwell against Chan and Dimerco and assessed damages in the amount of $308,000. The trial court correctly entered judgment for Scanwell against Chan and Dimerco jointly and severally in the amount of $308,000 and correctly denied the defendants' post-trial motions. The Court should affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE UNDER RULES 84.06(c) AND 84.06(g)

This Brief complies with the limitations contained in Mo.R.Civ.P. 84.06(b) and contains 11,433 words in 13 point Times New Roman font as counted by Microsoft Word 2000.

Respondent has filed herewith a diskette containing this Brief using Microsoft Word for Windows 2000, which has been scanned for viruses using Norton Anti-Virus Scan and is virus-free.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on September 29, 2004, two copies of this Brief and a virus fee diskette were mailed to:

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APPENDIX